A **POSITIVE VISION LABUAN LTD v. KETUA PENGARAH HASIL DALAM NEGERI & OTHER APPEALS**

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
SURIYADI HALIM OMAR FCJ
B AHMAD MAAROP FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEALS NO: 01(F)-11-03-2015(W),
01(F)-12-03-2015(W) & 01(F)-13-03-2015(W)]
C 20 FEBRUARY 2017

REVENUE LAW: *Income tax – Exemption – Offshore companies made irrevocable elections under s. 3A of Labuan Business Activity Tax Act 1990 ('LBATA') to be chargeable under Income Tax Act 1967 ('ITA') – Whether offshore companies*
D *entitled to income tax exemption on dividends received under Income Tax (Exemption) (No 22) Order 2007 ('Exemption Order') – Exemption Order to be read with ss. 2(3) & 3A of LBATA – Whether Exemption Order intended to apply only to a company subject to tax under LBATA – Offshore Companies elected to be taxed under s. 3B of ITA – Whether companies 'chargeable offshore companies' and no*
E *longer within terms of Exemption Order*

REVENUE LAW: *Income tax – Exemption – Income tax dividends received by offshore companies – Whether offshore companies qualified for exemption from income tax – Whether Director of Inland Revenue correct in law to disallow tax exemption available under Income Tax (Exemption) (No 22) Order 2007*
F *('Exemption Order') – Whether Ministry of Finance could by policy or administrative decision declare Exemption Order ceased to apply – Whether s. 3A of Labuan Business Activity Tax Act 1990 expressly states offshore companies are eligible or denied exemption – Whether Exemption Order has legal status of subsidiary legislation – Whether s. 127(5) of Income Tax Act 1967 gives offshore*
G *companies vested rights – Whether Ministry of Finance or Director of Inland Revenue has jurisdiction to rely arbitrarily on policy to deny offshore companies' entitlement to tax exemption – Whether time frame prescribed on Exemption Order – Whether denial of right to exemption ultra vires, illegal or void*

CIVIL PROCEDURE: *Judicial review – Income tax – Exemption – Offshore*
H *companies made irrevocable elections under s. 3A of Labuan Business Activity Tax Act 1990 ('LBATA') to be chargeable under Income Tax Act 1967 ('ITA') – Whether companies entitled to income tax exemption on dividends received under the Income Tax (Exemption) (No 22) Order 2007 ('Exemption Order') – Exemption Order to be read with ss. 2(3) & 3A of LBATA – Whether Exemption Order*
I *intended to apply only to a company subject to tax under LBATA – Offshore Companies elected to be taxed under s. 3B of ITA – Whether companies 'chargeable offshore companies' and no longer within terms of Exemption Order*

STATUTORY INTERPRETATION: *Subsidiary legislation – Validity – Exemption Order – Whether made by statutory order – Whether an order having legislative effect – Whether to be read subject to and consistent with provisions of substantive or parent act – Whether Exemption Order has legal status of subsidiary legislation – Interpretation Acts 1948 and 1967, ss. 3 & 24*

WORDS & PHRASES: *'Chargeable offshore company' – Whether referred to offshore companies which made irrevocable elections under s. 3A of Labuan Business Activity Act 1990 to be chargeable under Income Tax Act 1967 – Whether companies entitled to income tax exemption on dividends received under Income Tax (Exemption) (No 22) Order 2007*

The appellants, being companies incorporated under the Labuan Companies Act 1990, as a general rule, would be subject to tax under the Labuan Business Activity Tax Act 1990 ('LBATA'). About three months after their incorporation, the appellants made statutorily permissible irrevocable election to be subject to tax under the Income Tax Act 1967 ('ITA'). The appellants had received dividends in the year of assessment 2011, income which they believed was exempted from income tax, on account of the exemption provided for under the Income Tax (Exemption) (No 22) Order 2007 ('Exemption Order'). After some correspondences were exchanged between the appellants and the respondent, the respondent informed the appellants that no Labuan company would be qualified for exemption from income tax under the Exemption Order effective 12 February 2010, once an election was made. The appellants therefore did not qualify. The appellants filed an application for leave to commence judicial review, *inter alia*, for an order of *certiorari* to quash the respondent's decision. The High Court dismissed the appellants' application for judicial review with costs though conceded that the appellants were entitled to exemption up to the date of election. The Court of Appeal, in affirming the decision of the High Court, opined that as the appellants were now 'chargeable offshore company' the moment the elections were made, they therefore were no longer within the terms of the Exemption Order. The appellants obtained leave from this court on the following questions of law (a) whether the Ministry of Finance could, by a policy or administrative decision, declare that an Exemption Order, which was a subsidiary legislation under the Interpretation Acts 1948 and 1967, cease to apply from a stipulated date without revoking the same ('Question 1'); (b) whether a Labuan offshore company which elects under s. 3A of the LBATA to be taxed under the Income Act 1967 and Exemption Order acquires a vested right that remained so long as the Exemption Order remained in force ('Question 2'); and (c) whether an offshore company which has elected to be taxed under s. 3B of the Income Tax Act 1967 which is now known as a Labuan company for the purposes of the LBATA was entitled to the tax exemption granted under the Exemption Order ('Question 3').

Held (dismissing appeals)
Per Md Raus Sharif PCA (for the majority):

(1) In order to be taxed under the ITA, a Labuan company must make an irrevocable election under s. 3A of the LBATA. Once an election is made, income from Labuan business activity by a Labuan company is charged to tax pursuant to the ITA as stipulated under para. 2(3)(d) of LBATA. Thus, s. 2(3) of the LBATA reinforces s. 3B of the ITA and made it clear that the latter applied in respect of Labuan business activity carried on by a Labuan entity (which includes Labuan company) which makes an election under s. 3A of the LBATA, which under s. 3B of the Income Tax Act 1967 was a chargeable offshore company. (paras 38 & 39)

(2) The Exemption Order must be read in harmony with ss. 3A and 2(3) of the LBATA and s. 3B of the ITA. It is clear that a Labuan company that has elected to be taxed under the ITA could not continue to enjoy the exemption as the Exemption Order was intended to apply to a company that is subject to tax under the LBATA. It is no longer 'an offshore company' but a 'chargeable offshore company.' With effect from the date that the appellants made their respective elections, the appellants were 'chargeable offshore companies' and was therefore no longer within the terms of the Exemption Order. (paras 46 & 49)

(3) The introduction of ss. 3A and 2(3) of the LBATA and s. 3B of the ITA clearly distinguished between an 'offshore company' and 'chargeable offshore company.' The clear words 'chargeable offshore company' under s. 3B of the ITA refers to offshore company which had made irrevocable election to be taxed under the ITA. The Exemption Order was only meant for an offshore company. Thus, once the appellants made an irrevocable election to be taxed under the ITA, they could no longer enjoy the benefit under the Exemption Order. (para 50)

(4) Accordingly, there was no necessity to answer Question 1. As for Questions 2 and 3, the answers were in the negative. An offshore company (now known as Labuan Company) which has elected to be taxed under s. 3B of the ITA is not entitled to tax exemption on dividends received under the Exemption Order.

Per Suriyadi Halim Omar FCJ (dissenting):

(1) Under the new s. 3A inserted into the LBATA by s. 72 of the Finance Act 2007, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form to be charged to tax under the ITA. Section 3B of the ITA imported a new terminology; it now made reference to an offshore company that has made an election under the new s. 3A of the LBATA, as 'chargeable offshore company' for purposes of the ITA scheme. This new amended provision of s. 3B

of the ITA makes no reference to the Exemption Order, and does not expressly state that offshore companies, which had elected to be taxed under the ITA, to be eligible or denied the exemption. (paras 79-81)

(2) The insertion of s. 3B was to be effective from the year of assessment 2008 and subsequent years of assessment. The Exemption Order was to have effect for the year of assessment 2007 and subsequent years of assessment. There would have been no necessity to make the Exemption Order in relation to years of assessment subsequent to 2007 if it was not intended to apply to chargeable offshore companies after the year of assessment 2007. The extension of the Exemption Order to years of assessment beyond 2007 was clearly a transitional measure to enable an offshore company which had made an election to still gain the benefit under s.3B accorded to offshore companies which did not make such election, until such time as the Minister deemed it expedient to remove the benefit. When that happens, the cessation of that benefit can only be by way of revocation of the Exemption Order by another order, not a policy decision expressed administratively. (paras 83-85)

(3) Section 127(3) of the ITA provides that the Exemption Order is made by a statutory order, defined under s. 2 to mean an order having legislative effect. Clothed with legislative effect, this statutory order fits in squarely within the words 'subsidiary legislation' which is defined as 'any … order … or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967'. The Exemption Order which comes as a statutory order thus has the legal status of a subsidiary legislation, and anything done under any subsidiary legislation shall be deemed to be done under the Act or other written law under which the subsidiary legislation was made (s. 24 of the Interpretation Acts 1948 and 1967). In succinct terms, the Minister by statutory order, as empowered by s. 127(3) of the ITA, had granted an exemption to any offshore company in respect of its dividends income. As the appellants were offshore companies, the Exemption Order therefore applied to them. (paras 103-106)

(4) Section 127(5) of the ITA gives the appellants vested rights that cannot be taken away unless there exists clear terms that state otherwise. If the words of the Exemption Order are clear, then obey it. By virtue of the ordinary and natural meaning of the Exemption Order, and reading s. 3B of the ITA together with it, there could only be one interpretation *ie* dividends are exempted from tax under the ITA. As giving any other interpretation would lead to a departure of what was intended by the Legislature inscribed by the words of the statutory order, it was therefore incumbent upon the respondent to put into effect the appellants' statutory right *ie* to exempt dividends from income tax. (paras 113 & 114)

(5) It was the duty of the court to carefully scrutinise the extent of the delegation, particularly in cases which involved a right to impose any financial burden on a person or class of persons. Even though the appellants had not been burdened by additional taxes, by depriving them of the exemption the appellants had been financially burdened in another way. With the impugned policy never having been issued pursuant to any power authorised by Parliament, unlike an Exemption Order, which was a subsidiary legislation, the policy adverted to by the respondent therefore did not have any force of law. In accordance with the settled rules of construction, the respondent or the Ministry of Finance thus had no jurisdiction to unilaterally and arbitrarily rely on policy to deny the appellants' entitlement to the tax exemption. As the words in the Exemption Order were clear, and the appellants evidentially fell within the terms of the order, they therefore could not be denied of the benefits legislated. (paras 117-119)

(6) The respondent, or the Ministry of Finance, had no jurisdiction to unilaterally and arbitrarily declare 12 February 2010 as the cut-off date for the appellants to claim tax exemption for its dividend income by way of policy. With the Exemption Order yet to be revoked, apart from not prescribing a time frame for its duration, the respondent or the Ministry of Finance could not by policy or administrative decision declare that the Exemption Order ceased to apply as against the appellants. That denial of right to the exemption was therefore *ultra vires*, illegal, void, unlawful and/or in excess of any authority given. Therefore, Question 1 was to be answered in the negative whilst Questions 2 and 3 were to be answered in the positive. (paras 123-128)

Bahasa Malaysia *Headnotes*

Perayu-perayu, syarikat-syarikat yang ditubuhkan di bawah Akta Syarikat Labuan 1990, secara amnya, tertakluk pada cukai bawah Akta Cukai Aktiviti Perniagaan Luar Pesisir Labuan 1990 ('LBATA'). Tiga bulan selepas penubuhannya, perayu-perayu membuat pemilihan tidak boleh dibatalkan secara statutori dan dibenarkan untuk tertakluk pada cukai di bawah Akta Cukai Pendapatan 1967 ('ITA'). Perayu-perayu menerima dividen dalam tahun taksiran 2011, pendapatan yang mereka percaya dikecualikan daripada cukai pendapatan, atas dasar pengecualian yang diperuntukkan di bawah Perintah Cukai Pendapatan (Pengecualian) (No 22) 2007 ('Perintah Pengecualian'). Selepas beberapa surat-menyurat antara perayu-perayu dan responden, responden memaklumkan pada perayu-perayu bahawa tiada syarikat Labuan layak untuk pengecualian daripada cukai pendapatan di bawah Perintah Pengecualian berkuat kuasa 12 Februari 2010, setelah pemilihan dibuat. Oleh itu, perayu-perayu tidak layak. Perayu-perayu memfailkan permohonan kebenaran semakan kehakiman, antara lain, untuk perintah *certiorari* bagi membatalkan keputusan responden. Mahkamah Tinggi menolak permohonan perayu-perayu untuk semakan kehakiman dengan kos tetapi mengakui bahawa perayu-perayu berhak mendapat

pengecualian sehingga tarikh pemilihan. Mahkamah Rayuan, dalam mengesahkan keputusan Mahkamah Tinggi, berpendapat bahawa perayu-perayu adalah 'chargeable offshore company' apabila pemilihan dibuat, dengan itu mereka tidak lagi terangkum dalam syarat-syarat Perintah Pengecualian. Perayu-perayu memperolehi kebenaran dari mahkamah ini atas soalan undang-undang berikut (a) sama ada Kementerian Kewangan melalui polisi atau keputusan pentadbiran boleh mengisytiharkan bahawa Perintah Pengecualian, satu peruntukan subsidiari di bawah Akta Tafsiran 1948 dan 1967, terhenti terpakai dari satu tarikh ditetapkan tanpa membatalkan yang sama ('Soalan 1'); (b) sama ada syarikat luar pesisir Labuan yang memilih di bawah s. 3A LBATA untuk dicukaikan di bawah Akta Cukai 1967 dan Perintah Pengecualian memperoleh satu hak kukuh yang tetap selagi Perintah Pengecualian kekal berkuat kuasa ('Soalan 2'); dan (c) sama ada syarikat luar pesisir yang memilih untuk dicukaikan di bawah s. 3B Akta Cukai 1967 yang sekarang dikenali sebagai sebuah syarikat Labuan untuk tujuan LBATA berhak untuk mendapat pengecualian cukai di bawah Perintah Pengecualian ('Soalan 3').

Diputuskan (menolak rayuan-rayuan)
Oleh Md Raus Sharif PMR (keputusan majoriti):

(1) Untuk dikenakan cukai bawah ITA, sebuah syarikat Labuan mesti membuat pemilihan yang tidak boleh dibatalkan bawah s. 3A LBATA. Sebaik sahaja pemilihan dibuat, pendapatan daripada aktiviti perniagaan di Labuan melalui syarikat Labuan dikenakan cukai menurut ITA seperti yang dinyatakan di bawah perenggan 2(3)(d) LBATA. Oleh itu, s. 2(3) LBATA memperkuatkan s. 3B ITA dan menjadikannya jelas bahawa ia diguna pakai dalam aktiviti perniagaan Labuan yang dijalankan oleh entiti Labuan (termasuk syarikat Labuan) yang membuat pemilihan bawah s. 3A LBATA, di mana bawah s. 3B ITA adalah syarikat luar pesisir yang dikenakan cukai.

(2) Perintah Pengecualian harus dibaca selaras dengan ss. 3A dan 2(3) LBATA dan s. 3B ITA. Jelas bahawa syarikat Labuan yang memilih untuk dicukaikan bawah ITA tidak boleh menikmati pengecualian kerana Perintah Pengecualian hanyalah bertujuan untuk diguna pakai terhadap syarikat yang tertakluk pada cukai bawah LBATA. Ia bukan lagi 'syarikat luar pesisir' tetapi 'syarikat luar pesisir dikenakan cukai.' Berkuat kuasa dari tarikh perayu-perayu membuat pemilihan masing-masing, perayu-perayu adalah 'syarikat luar pesisir dikenakan cukai' dan dengan itu bukan lagi dalam lingkungan terma Perintah Pengecualian.

(3) Pengenalan ss. 3A dan 2(3) LBATA dan s. 3B ITA dengan jelasnya membezakan antara 'syarikat luar pesisir' dan 'syarikat luar pesisir dikenakan cukai'. Kata-kata jelas 'syarikat luar pesisir dikenakan cukai' bawah s. 3B ITA merujuk kepada syarikat luar pesisir yang telah membuat pemilihan tidak boleh dibatalkan untuk dicukaikan bawah

ITA. Perintah Pengecualian hanya untuk syarikat luar pesisir. Oleh itu, sebaik sahaja perayu-perayu membuat pemilihan yang tidak boleh dibatalkan untuk dicukaikan bawah ITA, mereka tidak boleh lagi menikmati manfaat bawah Perintah Pengecualian.

(4) Sewajarnya, tiada keperluan untuk menjawab Persoalan 1. Persoalan 2 dan 3 dijawab secara negatif. Sebuah syarikat luar pesisir (yang sekarang dikenali sebagai Syarikat Labuan) yang memilih untuk dicukaikan bawah s. 3B ITA tidak mempunyai hak untuk pengecualian cukai ke atas dividen yang diterima bawah Perintah Pengecualian.

Oleh Suriyadi Halim Omar HMP (menentang):

(1) Di bawah s. 3A baru yang telah dimasukkan ke dalam LBATA oleh s. 72 Akta Kewangan 2011, sebuah entiti Labuan yang menjalankan aktiviti perniagaan di Labuan boleh membuat pemilihan tidak boleh dibatalkan dalam bentuk yang ditetapkan untuk dikenakan cukai di bawah ITA. Seksyen 3B ITA memberikan istilah baru; ia sekarang membuat rujukan kepada satu syarikat luar pesisir yang telah membuat pemilihan di bawah s. 3A LBATA, sebagai 'chargeable offshore company' bagi tujuan skim ITA. Peruntukan yang baru dipinda ini iaitu s. 3B ITA tidak membuat rujukan kepada Perintah Pengecualian, dan tidak secara jelas menyatakan bahawa syarikat luar pesisir, yang memilih untuk dicukaikan di bawah ITA, layak atau dinafikan pengecualian.

(2) Kemasukan s. 3B berkuat kuasa dari tahun taksiran 2008 dan tahun-tahun taksiran berikutnya. Perintah Pengecualian berkuat kuasa bagi tahun 2007 dan tahun-tahun taksiran berikutnya. Tiada keperluan untuk membuat Perintah Pengecualian berhubungan tahun-tahun taksiran selepas 2007 jika ia tidak bertujuan untuk diguna pakai pada syarikat luar pesisir selepas tahun taksiran 2007. Perlanjutan Perintah Pengecualian kepada tahun taksiran selepas 2007 adalah jelasnya satu langkah tradisional untuk membolehkan sebuah syarikat luar pesisir yang telah membuat pemilihan mendapatkan manfaat di bawah s. 3B diberikan kepada syarikat-syarikat luar pesisir yang tidak membuat pemilihan itu, sehingga suatu masa Menteri mendapati adalah sesuai untuk membuang manfaat itu. Apabila perkara itu berlaku, pemberhentian manfaat itu hanya boleh dibuat melalui pembatalan Pengarahan Pengecualian melalui satu lagi perintah, dan bukan keputusan polisi yang dinyatakan secara pentadbiran.

(3) Seksyen 127(3) ITA memperuntukkan bahawa Perintah Pengecualian dibuat oleh perintah statutori, ditakrifkan di bawah s. 2 untuk bermaksud bahawa perintah yang mempunyai kesan perundangan. Dipakaikan dengan kesan perundangan, perintah statutori ini bersesuaian betul dalam perkataan 'subsidiary legislation' yang ditafsirkan sebagai 'any … order … or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having

legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967.' Perintah Pengecualian yang muncul sebagai perintah statutori mempunyai status undang-undang dari perundangan statutori, dan apa-apa yang dilakukan bawah perundangan subsidiari hendaklah disifatkan sebagai dilakukan bawah Akta atau undang-undang bertulis di mana perundangan subsidiari dibuat (s. 24 Akta Tafsiran 1948 dan 1967). Secara ringkas, Menteri melalui perintah statutori, yang diberikan kuasa oleh s. 127(3) ITA, telah membenarkan pengecualian kepada mana-mana syarikat luar pesisir berhubungan pendapatan dividen. Oleh kerana perayu-perayu adalah syarikat luar pesisir, Perintah Pengecualian diguna pakai ke atas mereka.

(4) Seksyen 127(5) ITA memberikan perayu-perayu hak kukuh yang tidak boleh disangkal kecuali wujudnya syarat-syarat jelas yang menyatakan sebaliknya. Jika perkataan-perkataan Perintah Pengecualian adalah jelas, maka ia seharusnya dipatuhi. Memandangkan maksud semulajadi dan biasa Perintah Pengecualian, dan bacaan s. 3B ITA bersama-samanya, hanya satu tafsiran yang boleh dicapai iaitu dividen dikecualikan daripada cukai di bawah ITA. Oleh kerana tafsiran lain akan membawa kepada penyimpangan dari apa yang diniatkan oleh Badan Perundangan yang tertulis oleh kata-kata perintah statutori, adalah tanggungjawab responden untuk melaksanakan hak statutori perayu-perayu iaitu untuk dividen-dividen dikecualikan daripada cukai pendapatan.

(5) Adalah tanggungjawab mahkamah untuk meneliti dengan berhati-hati keluasan delegasi, terutamanya dalam kes yang melibatkan hak untuk mengenakan bebanan kewangan ke atas seseorang atau segolongan orang. Walaupun perayu-perayu tidak dibebankan oleh cukai tambahan, perayu-perayu telah dibebankan dari segi kewangan dengan cara lain apabila hak mereka ke atas pengecualian dinafikan. Dengan polisi yang dipersoalkan tidak pernah dikeluarkan menurut mana-mana kuasa yang diberikan oleh Parlimen, tidak seperti satu Perintah Pengecualian, yang merupakan perundangan subsidiari, polisi yang dirujuk oleh responden tidak mempunyai apa-apa kuat kuasa undang-undang. Sejajar dengan peraturan-peraturan pentafsiran yang ditetapkan, responden atau Menteri Kewangan tidak mempunyai bidang kuasa untuk secara unilateral atau secara arbitrari merujuk kepada polisi bagi menafikan hak perayu-perayu kepada pengecualian cukai. Kerana perkataan-perkataan dalam Perintah Pengecualian adalah jelas, dan perayu-perayu terangkum dalam syarat-syarat perintah, mereka dengan itu tidak boleh dinafikan manfaat-manfaat yang digubalkan.

(6) Responden, atau Menteri Kewangan, tidak mempunyai bidang kuasa untuk secara unilateral atau secara arbitrari mengisytiharkan 12 Februari 2010 sebagai tarikh penggalan untuk perayu-perayu menuntut pengecualian cukai untuk pendapatan dividen melalui polisi. Dengan Perintah Pengecualian belum lagi dibatalkan, selain daripada

kegagalan menetapkan satu kerangka masa untuk tempohnya, responden atau Menteri Kewangan tidak boleh melalui polisi atau keputusan pentadbiran mengisytiharkan Perintah Pengecualian tidak boleh diguna pakai pada perayu-perayu. Penafian hak terhadap pengecualian adalah dengan itu *ultra vires*, tidak sah, menyalahi undang-undang dan/atau melebihi apa-apa kuasa yang diberikan. Oleh itu, soalan 1 dijawab secara negatif dan soalan-soalan 2 dan 3 dijawab secara positif.

Case(s) referred to:

Bulova Watch Co v. Attorney General of Canada [1951] OR 360 ***(refd)***

Edward Maughan (Surveyor of Taxes) v. The General Trustees of the Free Church of Scotland (1893) 20R 759 ***(refd)***

Hansraj v. HH Dave Asst. Collector of Excise AIR 1970 SC 755 ***(refd)***

Kamla Devi v. Takhatmal AIR 1964 SC 859 ***(refd)***

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Co-operative Insurance Society Ltd [2000] 2 CLJ 149 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***

Mangin v. Inland Revenue Commissioners [1971] AC 739 ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Positive Vision Labuan Ltd & Ors v. Ketua Pengarah Hasil Dalam Negeri [2013] 6 MLJ 597 ***(refd)***

Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri and Other Appeals [2014] 8 CLJ 285 CA ***(refd)***

Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] 4 CLJ 576 HC ***(refd)***

Vacher & Sons v. London Society of Compositors [1913] AC 107 ***(refd)***

WT Ramsay Ltd and Ors v. Inland Revenue Commissioners and Ors [1982] AC 300 ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Finance Act 2007, ss. 4, 72

Income Tax Act 1967, ss. 2(1), (10)(e), 3B, 127(3)(b), (4), (5)

Interpretation Acts 1948 and 1967, ss. 3, 22, 24, 25, 35(2)

Labuan Business Activity Tax Act 1990, ss. 2(3), 3, 3A(1), 4, 26

Other source(s) referred to:

Aiyars Major Law Lexicon, 4th edn. 2010, vol 2, p 2075

(Civil Appeal No: 01(f)-11-03-2015(W) & 01(f)-13-03-2015(W))
For the appellant - Cyrus Das & T Sudhar; M/s Shook Lin & Bok
For the respondent - Hazlina Hussain, Abu Tariq Jamaluddin, Muhammad Farid Jaafar & Norsalwani Muhd Nor FCs, Inland Revenue Board

(Civil Appeals No: 01(f)-12-03-2015(W) & 01(f)-13-03-2015(W))
For the appellant - DP Naban & Ashley Lee Si Han; M/s Lee Hishamuddin Allen & Gledhill
For the respondent - Hazlina Hussain, Abu Tariq Jamaluddin, Muhammad Farid Jaafar & Norsalwani Muhd Nor FCs, Inland Revenue Board

[Editor's note: This case has been published vide [2017] 3 CLJ 629 but without the majority judgment. Following the availability of the majority judgment, the editors have taken it upon themselves to re-publish the whole judgment (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] There are three appeals before this court. The appellants are Positive Vision Labuan Limited, GA investment Limited and Avenues Zone Inc. They are appealing against the decision of the Court of Appeal that had affirmed the decision of the High Court.

[2] The High Court had held that Labuan companies like the appellants, which had made irrevocable elections under s. 3A of the Labuan Business Activity Tax Act 1990 (LABATA) to be chargeable under the Income Tax Act 1967 (the ITA), are not, from the date of the election, entitled to income tax exemption on dividends received as provided under the Income Tax (Exemption) Order (No. 22) dated 18 December 2007 (the Exemption Order).

[3] Leave to appeal was granted by this court to the three appellants on three identical questions of law which reads as follows:

> 1. Whether the Ministry of Finance could by a policy or administrative decision declare that an Exemption decision, to writ, Income Tax (Exemption) (No. 22) Order 2007, PU(A)437/2007 which is a subsidiary legislation under the Interpretation Act 1948 and 1967, cease to apply from a stipulated date without revoking the same?
>
> 2. Whether a Labuan offshore company which elects under section 3A of the Labuan Offshore Business Activity Tax Act 1990 to be taxed under the Income Tax Act 1967 and Exemption Order acquires a vested right that remains so long as the Exemption Order remains in force?
>
> 3. Whether an offshore company which has elected to be taxed under section 3B of the Income Tax Act 1967 which is now known as Labuan company for the purpose of the Labuan Offshore Business Activity Tax Act 1990, is entitled to the tax exemption granted under the Income Tax (Exemption) (No. 22) Order 2007?

A **Background Facts**

[4] The appellants are offshore companies and are in the business of investment holding. They were incorporated under the Offshore Companies Act 1990. By virtue of Labuan Business Activity Tax (Amendment) Act 2010, the appellants are also known as Labuan companies and entities.

B

[5] The profits of the Labuan companies are subjected to tax under LABATA. However, *vide* the amendments to the Finance Act 2007, a Labuan company may make an irrevocable election in the prescribed form that its profit is to be charged to tax in accordance with the ITA in that year of assessment and subsequent years of assessment.

C

[6] At the same time on 18 November 2007, pursuant to s. 127(3) of the ITA, the Minister of Finance *vide* the Exemption Order exempting from income tax various types of income. One category of income exempted is dividends received by an offshore company effective from year of assessment 2007.

D

[7] In the year of assessment 2011, the appellants each received the following dividends:

Positive Vision Labuan Ltd	:	RM147,018,944
GA Investment Ltd	:	RM80,000.000
Avenues Zone Ltd	:	RM49,300,000

E

[8] The appellants then respectively made an irrevocable election under s. 3A of the LABATA to be taxed under the ITA.

F **[9]** On 16 January 2012, the appellants' tax consultants wrote to the Ketua Pengarah Hasil Dalam Negeri (the respondent) seeking confirmation that a Labuan company which had made an election under s. 3A(1) of the LABATA to be taxed under the ITA was exempted from tax on dividends received by virtue of the Exemption Order.

G **[10]** On 20 June 2012, the respondent informed the appellants' tax consultant that the Ministry of Finance had decided that effective from 12 February 2010, the exemption from tax on dividends received under the Exemption Order was no longer available to a Labuan company which had made elections to be taxed under the ITA.

H

[11] Being aggrieved by the decision of the respondent, the appellants separately filed for judicial review. In their applications for judicial review, the appellants sought for, *inter alia*, the following reliefs:

(a) An order of *certiorari* to move the court for the purpose of quashing the
I decision of the respondent on 20 June 2012 ruling that the appellants does not qualify for exemption from tax under the Exemption Order;

(b) A declaration that the appellants qualifies for the exemption from income tax under the Exemption Order and accordingly the dividends received by the appellants in the year of assessment 2011, and subsequent years of assessment shall be exempted from tax; and

(c) A declaration that the respondent's decision is illegal and unconstitutional and thus, the decision is null and void and accordingly the dividends received by the appellants in the year of assessment 2011 and the subsequent year of assessment shall be exempted from tax under the Exemption Order.

[12] In the meantime on 2 August 2012, the respondent issued notices of assessment against each of the appellants for tax payable as follows:

(a) Positive Vision Labuan Ltd – RM36,754,986

(b) Avenues Zone Inc – RM24,650,000

(c) GA Investment Ltd – RM20,361,000

At The High Court

[13] On 6 February 2013, the High Court dismissed the appellants' application for judicial review. The High Court held as follows:

(i) since the Exemption Order was made, the position had now changed with the introduction of s. 3A(1) of the LABATA and amendment to s. 3B of ITA. Section 3B makes it clear that companies which have elected to be taxed under the 1TA was not covered by the Exemption Order. Once election is made, the appellants are no longer eligible for the exemption.

(ii) the letter which contained the decision of the respondent, put the cut-off date as 12 February 2010. It was a mere letter and no notification on *Gazette* on the cut-off date. The letter was dated on 20 June 2012 and the elections made by the appellants was very much earlier. The letter dated 20 June 2012 stated it was a matter of policy. The respondent could not decide on the cut-off date by merely basing on policy when the result would be that the appellants or other taxpayer in this position would be liable to be taxed. Article 96 of the Federal Constitution, provides, *inter alia*, that no tax shall be levied except by or under the authority of Federal law.

(iii) without the policy being made, the law was clear that once you have elected, then the Exemption Order was no longer applicable. Therefore, the non-applicability of the Exemption Order on the appellants must, without any other provision in the law, take effect from the date of election. Before the date, the appellants were still entitled to get the exemption.

A (iv) the decision of the respondent as stated in the letter dated 20 June 2012 was quashed only to the extent of the fixing of the cut-off date. The appellants were liable from the dates of election to be taxed under the ITA.

(See *Positive Vision Labuan Ltd & Ors v. Ketua Pengarah Hasil Dalam Negeri* [2013] 6 MLJ 597).

B

At The Court of Appeal

[14] The Court of Appeal in dismissing the appellants' appeals held as follows:

C (i) the court is under a duty to adopt an approach that promotes the purpose or object underlying a particular statue including taxing statues;

(ii) a statue has to be read in the correct context and the interpretation of the meaning of the statutory words should coincide with what Parliament meant to say. In ascertaining legislative intent in the interpretation of a statute, reference must be made to the words appearing in the statute for, *prima facie*, every words appearing in the statue must bear some meaning.

D

(iii) in considering s. 3B of the ITA, it was clear that through the amendments made, Parliament intended to distinguish between an offshore company which has made the election under s. 3A(1) of the LABATA as opposed to companies which did not. It was clear that the words "chargeable offshore companies" refer to offshore companies which had made the election.

E

F (iv) a statutory provision intending to withdraw an exemption should be stated clearly leaving no room for doubt as to its meaning.

(v) there was no ambiguity as to the meaning of s. 3B of the ITA. Section 3B clearly provided that "chargeable offshore companies" were subject to tax under the ITA.

G

(vi) the Exemption Order was a statutory order made under the power delegated to the Minister. Being an order made under delegated power, the Exemption Order must necessarily be read subject to and consistent with the provisions of the substantive parent Act. The Exemption Order was clear in that it applied only to "offshore company", which must be interpreted as defined under the ITA.

H

(vii) with effect from the date the appellants made their respective elections, the appellants were "chargeable offshore companies" and were therefore no longer within the terms of the Exemption Order. The appellants had failed to show that the Exemption Order applied to them.

I

(See *Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri and Other Appeals* [2014] 8 CLJ 285; [2014] 5 MLJ 333).

Submissions

[15] Counsel for Positive Vision Labuan Limited, Dato' Cyrus Das submitted that the Exemption Order applied to an offshore company that fell within the meaning under s. 2 of the LABATA. It was argued that the Exemption Order did not state that the exemption excludes offshore companies that have elected to be taxed under the ITA.

[16] Counsel further argued that since the appellants had elected to be taxed under ITA, there was no reason for the Exemption Order, which was also made under ITA not to apply to them. Since the Exemption Order was still subsisting, it continued to exempt dividends received by the appellants. The right remained as long as the Exemption Order remained in force and not revoked by the Minister.

[17] It was also submitted that s. 3B of the ITA and s. 3A of the LABATA did not affect the application of the Exemption Order. This is because s. 3B of the ITA did not make any reference to the Exemption Order, and did not restrict offshore companies, which have elected to be taxed under the ITA, to be eligible for the exemption.

[18] It was further submitted by counsel that the term "chargeable offshore company" as found in s. 3B of the ITA, was irrelevant for the purposes of determining "offshore company" under the Exemption Order. According to counsel, s. 3B of the ITA merely describes an offshore company that has elected to be taxed under the ITA, as a "chargeable offshore company".

[19] Counsel for GA Investment Limited and Avenues Zone Inc, Dato' DP Naban submitted the same. He also submitted that the learned High Court Judge was in error in concluding that s. 3B of the ITA was clear that companies which had elected under the ITA were not covered by the Exemption Order. According to counsel, in reaching such a conclusion, the learned judge was effectively rewriting the effect of the Exemption Order by reading that s. 3B of the ITA excluded the availability of the Exemption Order to the appellants.

[20] Revenue counsel, Puan Hazlina for the respondent submitted that s. 3B of the ITA as amended, clearly distinguished offshore company into "an offshore company" and "chargeable offshore company". According to her, under s. 3B a "chargeable offshore company" refers to an offshore company that has made an election under s. 3A(1) of the LABATA to be taxed under the ITA. Thus, it was submitted that the appellants having made the election under s. 3A(1) of the LABATA, are no longer "offshore companies" *per se* but are "chargeable offshore companies" and are chargeable to tax under the ITA. The appellants are therefore excluded from the Exemption Order.

[21] It was also submitted that there was no necessity to repeal or revoke the Exemption Order as it is still available to offshore companies that have not made the election to be taxed under the ITA. In conclusion, revenue counsel submitted that as the provisions of the law are clear and do not admit of any ambiguity, they must be strictly interpreted.

Decision

[22] As stated earlier, there are three questions of law posed before this court. The three questions are interlinked and could be dealt with together for the final disposal of these appeals.

[23] From the submission of the parties, the crux of the issue is centered on the interpretation of the Exemption Order, the relevant provisions of the ITA and LABATA.

[24] LABATA which was published in the *Gazette* on 30 August 1990 set on the tax haven status for Labuan. The tax haven status came in the form of a low tax regime. Section 3 of the LABATA sets out the scope of the tax applicable to offshore companies carrying on offshore business activities in or from Labuan.

[25] In 2008, in an effort to ensure that Labuan remain competitive as an international offshore financial center, the then Prime Minister who was also the Finance Minister, in his 2008 budget speech announced the need for Labuan companies be given the option to be taxed under the 1TA in addition to the existing tax regime.

[26] In order to give effect to that announcement, s. 3B of the ITA was amended by the Finance Act 2007 (Act 683). It reads as follows:

> Non-chargeability to tax in respect of offshore business activity.
>
> 3B. Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company, other than an offshore company (in this Act referred to as chargeable offshore company), which has made an election under section 3A of the Labuan Offshore Business Activity Tax 1990.

[27] Section 3B was inserted into the ITA, through amendment of the Finance Act 2007 (Act 683). Prior to the amendment s. 3B read as follows:

> Non-chargeability to tax in respect of offshore business activity.
>
> 3B. Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company.

[28] Section 3 of the LABATA provides:

> Subject to this Act, an offshore company carrying on an offshore business activity shall be charged to tax in accordance with this Act for each year of assessment in respect of that offshore business activity.

[29] However, Act 683 also amended LABATA by inserting a new s. 3A. Section 3A provides:

> Offshore business activity chargeable to Income Tax Act 1967 upon election.
>
> 3A. (1) Notwithstanding any other provision of this Act, an offshore company carrying on an offshore business activity may make an irrevocable election in the prescribed form that any profit of the offshore company for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the Income Tax Act 1967 in respect of that offshore business activity.
>
> (2) The election referred to in subsection (1) shall be made and furnished to the Director General three months after the beginning of the basis period for a year of assessment;
>
> Provided that for the basis period ending on a day in the year of assessment 2008, the election under this section may be made and furnished before 1 August 2008.

[30] Section 3A of the LABATA was further amended by Labuan Offshore Business Activity Tax (Amendment) Act 2010 (Act A1366). The new s. 3A as amended provides:

> Labuan business activity chargeable to Income Tax Act 1967 upon election.
>
> 3A. (1) Notwithstanding any other provision of this Act, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form that any profit of the Labuan entity for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the Income Tax Act in respect of that Labuan business activity.
>
> (2) The election referred to in subsection (1) shall be made and furnished to the Director General three months after the beginning of the basis period for a year of assessment.
>
> Provided that for the basis period ending on a day in the year of assessment 2008, the election under this section may be made and furnished before 1 August 2008.

[31] The applicability of the income Tax Act 1967 in respect of certain offshore business activity is provided under s. 2(3) of the LABATA. Prior to amendment by Act 683, the section provides:

> (3) For the avoidance of doubt, it is declared that the provisions of the Income Tax Act 1967 shall apply in respect of
>
> (a) an activity other than an offshore business activity carried on by an offshore company; or
>
> (b) (deleted by Act 624);

A (c) an offshore insurance business carried on by a Malaysian offshore insurer as defined under the Offshore Insurance Act 1990, which is a branch of a Malaysian insurer.

[32] Consistent with the new s. 3A of the LABATA as amended by Act 683, s. 2(3) of the LABATA was also amended by Act 683, which after B amendment reads as follows:

(3) For the avoidance of doubt, it is declared that the provisions of the Income Tax Act 1967 shall apply in respect of business activity of

(a) an activity other than an offshore business activity carried on by an offshore company;

C

(b) (deleted by Act 624);

(c) an offshore insurance business carried on by a Malaysian offshore insurer as defined under the Offshore Insurance Act 1990, which is a branch of a Malaysian insurer; or

D (d) an offshore business activity carried on by an offshore company which makes an election under section 3A'.

[33] Section 2(3) of the LABATA was further amended by Act A1366, which upon amendment reads as follows:

E (3) For the avoidance of doubt, it is declared that the provisions of the Income Tax Act 1967 shall apply in respect of business activity of:

(a) an activity other than a Labuan business activity carried on by a Labuan entity; and

(b) (deleted by Act 624)

F (c) (deleted)

(d) a Labuan business activity carried on by a Labuan entity which makes an election under section 3A.

[34] In this regard, Act A1366 also inserted the new s. 2B. Under the new G s. 2B(1) the Labuan entities shall be specified in the Schedule which was also inserted by Act A1366. Under the Schedule, a Labuan company is a Labuan entity.

[35] Further, the Finance Act 2011 (Act 719) amended s. 2 of the ITA which came into force on 11 February 2010. The amendments read as H follows:

(a) In subsection (1):

(i) …

(ii) by inserting after the definition of "Inland Revenue Board of I Malaysia" the following definitions:

Labuan business activity has the meaning assigned to it in the Labuan Business Activity Tax Act 1990 [Act 445];

> "Labuan company" means a Labuan company incorporated under the Labuan Companies Act 1990 [Act 441] and includes a foreign Labuan company registered under the Act, Labuan limited partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 [Act 707], Labuan trust as defined in the Labuan Trusts Act 1996 [Act 554] and a Malaysian bank as defined in the Labuan Financial Services and Securities Act 2010 [Act 704];

(iii) by deleting the definition of "offshore business activity"; and

(iv) by deleting the definition of "offshore company"; and

(b) by inserting after subsection (9) the following subsection:

(10) Any reference in this Act to:

(a) "Labuan Offshore Business Activity Tax 1990" is construed as reference to "Labuan Business Activity Tax Act 1990";

(b) "Labuan Offshore Financial Services Authority" is construed as a references to "Labuan Financial Services Authority";

(c) "offshore business activity" is construed as reference to "Labuan business activity";

(d) "Offshore Companies Act 1990" is construed as reference to "Labuan Companies Act 1990"; and

(e) "offshore company" is construed as reference to "Labuan company".

[36] With the amendment of the ITA through the Finance Act 2011 (Act 719) "offshore company" is now construed as reference to a "Labuan company".

[37] With the aforesaid amendments a Labuan company can elect to either:

(i) pay tax under LABATA or

(ii) pay tax under the ITA.

[38] In order to be taxed under the ITA, a Labuan company must make an irrevocable election under s. 3A of the LABATA. Once an election is made, income from Labuan business activity by a Labuan company is charged to tax pursuant to the ITA as stipulated under para. 2(3)(d) of the LABATA which reads:

> (3) For the avoidance of doubt, it is declared that the provisions of the Income Tax Act 1967 shall apply in respect of
>
> (d) a Labuan business activity carried on by a Labuan entity which makes an election under section 3A.

[39] Thus, in our view, s. 2(3) of the LABATA reinforces s. 3B of the 1TA and makes it clear that the latter applies in respect of Labuan business activity carried on by a Labuan entity [which includes Labuan company] which makes an election under s. 3A of the LABATA, which under s. 3B of the Income Tax Act 1967 (before being amended by Act 719) was a chargeable offshore company.

[40] As stated earlier, s. 3B of the ITA provides that the ITA applies to Labuan company which has made an irrevocable election and such Labuan company is referred to as "chargeable offshore company". The question is whether a Labuan company which had elected to be taxed under the ITA could still claim exemption from being charged to tax on dividends declared on the basis of the Exemption Order.

[41] For ease of reference, the relevant provisions of the Exemption Order is reproduced:

INCOME TAX ACT 1967

INCOME TAX (EXEMPTION) (NO. 22) ORDER 2007

In exercise of the powers conferred by paragraph 127(3)(b) of the Income Tax Act 1967 (Act 53) the Minister makes the following order:

Citation and commencement

1. (1) This Order may be cited as Income Tax (Exemption) (No. 22) Order 2007.

(2) This Order shall have effect from the year assessment 2007 and subsequent years of assessment.

Interpretation

2. In this Order, unless the context otherwise requires -

"Offshore trust" shall have the meaning assigned thereto by the Labuan Offshore Business Activity Tax 1990 (Act 445); and

"Offshore company" has the meaning assigned to it in Labuan Offshore Business Activity Tax 1990.

Exemption

3. The Minister exempts from tax -

(a) dividends received by an offshore company.

(b) dividends received from an offshore company which are paid, credited or distributed out of income derived from an offshore business activity or, income exempt from tax;

(c) distributions received from an offshore trust by the beneficiaries;

(d) royalties received from an offshore company by a nonresident person or another offshore company;

(e) interest received from an offshore company by a non-resident person (other than interest accruing to a business carried on by a non-resident person in Malaysia where that non-resident person is licensed to carry on a business under the Banking and Financial Institutions Act 1989 [Act 372], Islamic Banking Act 1983 [Act 276], Insurance Act 1996 [Act 553] or Takaful Act 1984 [Act 312]) or another offshore company;

(f) interest received from an offshore company by a resident person (other than a person licensed to carry on a business under the Banking and Financial Institutions Act 1989, Islamic Banking Act 1983, Insurance Act 1996 or Takaful Act 1984); and

(g) amounts received from an offshore company by a nonresident person or another offshore company, in consideration of services, advice or assistance specified in paragraphs 4A(i) and (ii) of the Act.

[42] It is clear that para. 3(a) of the Exemption Order exempts from tax dividends received by an offshore company. Section 2 of the Exemption Order defined offshore company to have the meaning assigned to it in the LABATA. In the LABATA offshore company is construed as reference to Labuan Company. With the amendment to the LABATA "offshore company" is now known as "Labuan Company". Thus a Labuan Company, which chooses not to elect to be taxed under the ITA, will continue to be taxed according to the LABATA, and the dividends declared will be exempted from tax under the ITA by virtue of the Exemption Order.

[43] We are of the view that the amendments to the ITA and the LABATA as illustrated earlier were intended to make clear the distinction between a Labuan company under the LABATA and a chargeable offshore company under the ITA. Thus, the offshore company under the Exemption Order must be construed as an offshore company (now referred to as Labuan company) which is subjected to tax under the LABATA and not to chargeable offshore company that is subjected to tax under the ITA.

[44] The wordings of s. 3B of the ITA and ss. 3A and 2(3) of the LABATA as well as the Exemption Order are clear and unambiguous. It is trite that when the provisions of law are clear and does not admit of any ambiguity, then the provisions must be strictly interpreted. This court in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 had held:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

A

> As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in *Beckwith v. R*. [1976] 12 ALR 333, at p. 337.

[45] Further, in interpreting the Exemption Order, regard must be given to ss. 3A and 2(3) of the LABATA and s. 3B of the ITA. This is especially so
B when the Exemption Order was made pursuant to s. 127(3) of the ITA under the power delegated to the Minister. Being an order made under delegated power, the Exemption Order had to be read subject to and consistent with the provisions of the ITA. Section 25 of the Interpretation Acts 1948 and 1967 clearly provides:

C

> Subsidiary legislation shall be deemed to be made under all powers thereunto enabling, whether in the Act or other written law under which it is made or under this Act and whether or not it purports to be made in exercise of any particular power or powers.

[46] Thus, the Exemption Order must be read in harmony with ss. 3A and
D 2(3) of the LABATA and s. 3B of the ITA. When this is done, it will become very clear that a Labuan company that has elected to be taxed under the ITA cannot continue to enjoy the exemption as the Exemption Order was intended to apply to a company that is subject to tax under the LABATA. It is no longer "an offshore company" but "a chargeable offshore company".

E **[47]** In the present case, it is not in dispute that the appellants had made an irrevocable election to be taxed under the ITA. Positive Vision made the election on 15 June 2011, GA Investment Ltd on 30 May 2011 and Avenue Zone Ltd on 13 June 2011. By electing to be taxed under the ITA the appellants were known as chargeable offshore company. The status of the
F appellants were no longer "offshore company" but "chargeable offshore company". And the Exemption Order applied only to offshore company (now known as Labuan Company).

[48] On the facts, at the time the appellants opted for irrevocable election in 2011, ss. 3A and 2(3) of the LABATA and s. 3B of the ITA were already
G in operation. Therefore, the content of the respondent's letter dated 20 June 2012 was in effect merely complying with the newly inserted s. 3A of the LABATA as well as s. 3B of the ITA.

[49] Accordingly, we are of the same view with the courts below that with effect from the date that the appellants made their respective elections, the
H appellants were "chargeable offshore companies" and were therefore no longer within the terms of the Exemption Order. The suggestion by the appellants that Labuan companies like the appellants, which had elected to be taxed under the 1TA could claim exemption on the dividends from being charged to tax under the ITA on the basis of the Exemption Order is absurd.

I

[50] In conclusion, we are of the view that the introduction of ss. 3A and 2(3) of the LABATA and 3B of the ITA clearly distinguished between an "offshore company" and "chargeable offshore company". The clear words "chargeable offshore company" under s. 3B of the ITA refers to offshore company which had made irrevocable election to be taxed under the ITA. The Exemption Order is only meant for an offshore company. Thus, the courts below were right in holding that once the appellants made an irrevocable election to be taxed under the ITA, they can no longer enjoy the benefit under the Exemption Order.

[51] It is clear that the Exemption Order was intended to apply to a company that is subject to tax under the LABATA. Thus, the need of revoking the Exemption Order does not arise. Accordingly, there is no necessity to answer Question 1. As for Questions 2 and 3, the answers are in the negative. An offshore company (now known as Labuan Company) which has elected to be taxed under s. 3B of the ITA is not entitled to tax exemption on dividends received under the Exemption Order.

[52] For the above reasons, the appellants' appeals are dismissed with costs.

Suriyadi Halim Omar FCJ (dissenting):

[53] The appellants, being companies incorporated in 2011 under the Labuan Companies Act 1990, as a general rule would be subject to tax under the Labuan Business Activity Tax Act 1990 (the LBATA), an Act to provide for the imposition, assessment and collection of tax on a Labuan business activity carried on by a Labuan entity in or from Labuan and for matters connected therewith.

[54] Section 72 of the Finance Act 2007 (Act 683) inserted s. 3A into the LBATA. Under s. 3A which has effect for the year of assessment 2009 and subsequent years of assessment a Labuan entity carrying on a Labuan business activity may make an irrevocable election that any profit of the Labuan entity for any basis period for a year of assessment and subsequent basis period, be charged to tax under the ITA.

[55] Under s. 2(3) of the LBATA, it is legislated that for the avoidance of doubt, the provisions of the ITA shall apply in respect of an activity other than a Labuan business activity carried on by a Labuan entity and a Labuan business activity carried on by a Labuan entity which makes an election under s. 3A of the LBATA.

[56] The appellants, about three months after their incorporation, made that statutorily permissible irrevocable election to be subject to tax under the ITA.

[57] The appellants had received dividends in the year of assessment 2011, income which they believed was exempted from income tax, on account of the exemption provided for under the Income Tax (Exemption) (No. 22) Order 2007 PU(A) 437/2007 (Exemption Order). The appellants on 16 January 2012, through their tax consultants, applied for a decision from the respondent in respect of the exemption of those dividends under the Exemption Order.

[58] After some correspondences were exchanged between the appellants and the respondent, the respondent informed the appellants that no Labuan company would be qualified for exemption from income tax under the Exemption Order effective 12 February 2010, once an election was made. The appellants therefore did not qualify.

[59] On 27 July 2012, the appellants filed an application for leave to commence judicial review, *inter alia*, for an order of *certiorari* to quash the respondent's decision.

[60] Leave was granted on 14 August 2012 by the High Court.

[61] On 6 February 2013, the High Court dismissed the appellants' application for judicial review with costs though conceded that the appellants were entitled to exemption up to the date of election. In short, the High Court held that the respondent was wrong when deciding that, effective 12 February 2010, any Labuan company that made the election to be taxed under the ITA was ineligible to any exemption under the Exemption Order.

[62] Being dissatisfied, the appellants appealed to the Court of Appeal. On 27 June 2014 the Court of Appeal dismissed the appellants, appeal with costs of RM30,000 and affirmed the decision of the High Court. The Court of Appeal opined that, as the appellants were now "chargeable offshore company" the moment the elections were made, they therefore were no longer within the terms of the Exemption Order.

[63] On 16 March 2015 the appellants successfully obtained leave from us on the following questions of law:

(a) Whether the Ministry of Finance could by a policy or administrative decision declare that an Exemption Order, *to wit*, Income Tax (Exemption) (No. 22) Order 2007 PU(A) 437/2007, which is a subsidiary legislation under the Interpretation Acts 1948 and 1967, cease to apply from a stipulated date without revoking the same?

(b) Whether a Labuan offshore company which elects under s. 3A of the Labuan Business Activity Tax Act 1990 to be taxed under the Income Tax Act 1967 and Exemption Order acquires a vested right that remains so long as the Exemption Order remains in force?

(c) Whether an offshore company which has elected to be taxed under s. 3B of the Income Tax Act 1967 which is now known as a Labuan company for the purposes of the Labuan Business Activity Tax Act 1990, is entitled to the tax exemption granted under the Income Tax (Exemption) (No. 22) Order 2007?

The Appellants' Submission

[64] Counsel for the appellants submitted that the Exemption Order applies to an offshore company that falls within the meaning assigned under s. 2 of the LBATA. Section 3(a) of the Exemption Order also states that the Minister exempts from tax dividends received by an offshore company. The appellants submitted that it was beyond dispute that the appellants are offshore companies.

[65] It was submitted that the Exemption Order does not state that the exemption excludes offshore companies that have elected to be taxed under the ITA. Having elected to be taxed under the ITA, there was thus compelling reason for the Exemption Order, which was also made under the ITA, to still apply to them. As it is still subsisting, it continues to exempt dividends received by the appellants. That acquired right remained as long as the Exemption Order remains in force, and thus it was incumbent on the respondent to give effect to the will of the Legislature.

[66] Expanding on this argument, the appellants submitted that s. 3B of the ITA and s. 3A of the LBATA did not affect the application of the Exemption Order. Section 3B of the ITA did not make any reference to the Exemption Order, and did not restrict offshore companies, which have elected to be taxed under the ITA to be eligible for the exemption.

[67] It was further submitted by the appellants that the term "chargeable offshore company" as contained in s. 3B of the ITA, was irrelevant for purposes of determining "offshore company" under the Exemption Order. In fact, s. 3B of the ITA merely describes an offshore company that has elected to be taxed under the ITA, as a "chargeable offshore company".

[68] According to the appellants, it was therefore puzzling as to how the learned judge could arrive at the conclusion that s. 3B of the ITA made it clear that companies that have elected to be taxed under the ITA were not covered by the Exemption Order. They contended that the respondent has no legal basis for denying the tax exemption. By denying the exemption the learned judge had effectively rewritten the effect of the Exemption Order permitted by s. 3B of the ITA.

[69] Learned counsel for the appellants further submitted that the respondent's decision not to accord the benefits of the Exemption Order based on the policy of the Ministry of Finance, and without revoking it, contravened the Exemption Order. It amounted to an error of law. The said decision was thus *ultra vires*, illegal, void, unlawful and/or in excess of authority.

[70] The appellants ventilated the argument that the Court of Appeal seemed to have proceeded on an implicit revocation of the Exemption Order by relying on the amendments made to the ITA and the LBATA, brought about by the Finance Act 2007 (Act 683) and the Labuan Offshore Business Activity Tax (Amendment) Act 2010 (Act A1366).

[71] The appellants submitted that tax law does not recognise any doctrine of implied revocation.

The Respondent's Submission

[72] The respondent submitted that s. 3B of the ITA makes it clear that companies which have elected to be taxed under the ITA are not covered by the Exemption Order. Section 3B of the ITA establishes an offshore company into a chargeable offshore company in reference to an offshore company that has made an election under s. 3A of the LBATA to be taxed under the ITA.

[73] It was submitted that having made the election under s. 3A of the LBATA, the appellants no longer were "offshore companies" and therefore excluded from the Exemption Order. It was submitted that these provisions of the law are clear and unambiguous and must be strictly interpreted.

[74] Learned counsel for the respondent further submitted that there was no necessity to repeal or revoke the existing Exemption Order as it was still available to an offshore company taxed under the LBATA or offshore companies that have yet to make elections under the ITA.

[75] The respondent submitted that s. 3B of the ITA expressly excluded an offshore company which elects to be subject to the ITA from being an offshore company for the purpose of tax exemption. The company could not now avail itself of the benefit of the exemption, which is applicable only for an offshore company under the LBATA. In short, as the appellants are no longer "offshore companies" they are therefore no longer entitled to the exemption from income tax under the Exemption Order.

Our Analysis

[76] The appellants are offshore companies having been incorporated on the following dates under the Labuan Companies Act 1990:

(i) Positive Vision Labuan Ltd. – 22 March 2011;

(ii) GA Investment Ltd. – 22 March 2011; and

(iii) Avenue Zone Inc. – 16 March 2011.

[77] The appellants are known as 'Labuan companies' and 'Labuan entities' under s. 3 of the LBATA pursuant to changes brought about by the amending s. 3(2) of the Labuan Offshore Business Activity (Amendment) Act 2010 (Act A1366), and are in the business of investment holding, with their registered offices being in Labuan. There are no disagreements as to the character of the appellants by both parties (except once the appellants elected to be taxed under the ITA).

[78] The profit of a Labuan company is subject to a preferential tax and shall be charged at the rate of 3% for a year of assessment upon the chargeable profits under s. 4 of the LBATA. It may even elect to be charged for a year of assessment to a fixed tax of RM20,000 under the LBATA.

[79] As abovementioned at para. 2, under the new s. 3A inserted into the LBATA by s. 72 of Act 683, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form to be charged to tax under the ITA. To elucidate further, Act 683 brought about amendments of the ITA, the LBATA and two other unconnected Acts (the Stamp Duty Act 1949 and the Petroleum (Income Tax) Act 1967).

[80] Under s. 4 of Act 683, s. 3B of the ITA was amended, and thereafter reads as follows:

> Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company ***other than an offshore company (in this Act referred to as "chargeable offshore company"), which has made an election under section 3A of the Labuan Offshore Business Activity Tax Act 1990*** (amendments emphasised).

[81] The above amendment to s. 3B of the ITA imported a new terminology. It now made reference to an offshore company that has made an election under the new s. 3A of the LBATA, as 'chargeable offshore company' for purposes of the ITA scheme.

[82] It is noteworthy that the new term 'chargeable offshore company' is peculiar only to ITA and absent in the LBATA and the Exemption Order. This new amended provision of s. 3B of the ITA makes no reference to the Exemption Order and does not expressly state that offshore companies, which have elected to be taxed under the ITA, to be eligible or denied the exemption. The relevancy or want of the introduction of the term 'chargeable', leading to the phrase "chargeable offshore company", becomes clearer at the end of these grounds of judgment.

[83] Act 683 which inserted s. 3B into the ITA was published in the *Gazette* on 28 December 2007. The Exemption Order was also published in the *Gazette* on 28 December 2007.

The insertion of s. 3B was to be effective from the year of assessment 2008 and subsequent years of assessment. The Exemption Order was to have effect for the year of assessment 2007 and subsequent years of assessment.

[84] There would have been no necessity to make the Exemption Order in relation to years of assessment subsequent to 2007 if it was not intended to apply to chargeable offshore companies after the year of assessment 2007 (as, by virtue of s. 3B, by the year of assessment 2008 tax would no longer be charged on income in respect of an offshore company except an offshore company which had made an election).

[85] In our view, the extension of the Exemption Order to years of assessment beyond 2007 was clearly a transitional measure to enable an offshore company which had made an election to still gain the benefit under s. 3B accorded to offshore companies which did not make such election, until such time as the Minister deems it expedient to remove the benefit. When that happens, the cessation of that benefit can only by way of revocation of the Exemption Order by another order, not by a policy decision expressed administratively.

[86] Section 2(10)(e) of the ITA, in tandem with changes brought about by the Labuan Offshore Business Activity (Amendment) Act 2010 (Act A1366), also legislated that the term "offshore company, would thenceforth be referred to as 'Labuan company' which under s. 2(1) of the ITA simply means 'a Labuan company incorporated under the Labuan Companies Act 1990'.

[87] For further clarification of the effect of the amendments to the LBATA and ITA, it is of relevance to refer to s. 35(2) of the Interpretation Acts 1948 and 1967 for guidance. Its reads as follows:

> Section 35(2)
>
> Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law or provision so repealed shall be construed as references to the re-enacted law or provision.

[88] Pursuant to the above s. 35(2) of the Interpretation Acts 1948 and 1967, the term "offshore company" in the Exemption Order thus must be construed as to eventually mean "Labuan company", after taking into account the amendments in the LBATA. Under s. 2(10)(e) of the ITA, the term "offshore company" is referred to as "Labuan company".

[89] It is inevitable that preferential tax treatment be given to an offshore company (alternatively Labuan company) in order to maintain the competitiveness of Labuan as a business hub. A Labuan company may opt for a tax of 3% for a year of assessment upon the chargeable profits or elect to be charged for that year of assessment to tax of RM20,000 under the LBATA. The icing is s. 26 of the LBATA which empowers the Minister to exempt any Labuan entity in respect of any chargeable profits of that company.

[90] It does not take an accountant to reason out why the appellants opted for the ITA and abandoned the fantastic terms of the LBATA. Statutorily under the LBATA the appellants cannot avoid paying some tax to the respondent, bearing in mind that there is no evidence of any exemption given to them under s. 26 of the LBATA, as opposed to the Exemption Order being dangled to any offshore company under the ITA. With the availability of the

Exemption Order either very little or no tax will be paid by the appellants under the ITA. Obviously, any Labuan company that makes an irrevocable election to tax under the ITA must have benefits in its mind, ie, the exemption from the Exemption Order. There is nothing wrong in the appellants arranging their affairs in order to reduce his tax. Lord Wilberforce in *W.T Ramsay Ltd and Ors v. Inland Revenue Commissioners and Ors* [1982] AC 300 said:

> A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides.

[91] The appellants respectively made the fateful irrevocable election, three months after their incorporation (see para. 24 for their dates), as per the following dates:

15 June 2011: Positive Vision Labuan Ltd

30 May 2011: GA Investment Ltd

13 June 2011: Avenues Zone Inc.

[92] Thenceforth dissatisfaction arose hence this appeal.

[93] The chronology of events shows that on 16 January 2012 the appellants through their tax consultant, Messrs PricewaterhouseCoopers Taxation Services Sdn Bhd, applied for a decision from the respondent in respect of the exemption of their dividends received for the year of assessment of 2011 (dividends amounting to RM49,300,000) from income tax under the Exemption Order.

[94] In response, on 21 February 2012 the respondent informed the appellants' tax consultant that the appellants may submit the tax returns for the year of assessment 2011 based on their interpretation of the Exemption Order, as the Ministry of Finance had yet to state its policy in respect of the decision requested by the appellants. We could safely conclude that 'policy' in the context of this appeal, must mean a set of ideas, approach or plan of what to do in a particular situation agreed upon by the Minister of Finance.

[95] On 27 February 2012 the appellants submitted their tax returns for the year of assessment 2011 after having been granted an extension of time until 29 February 2012.

[96] On 20 June 2012, the respondent informed the appellants that even though the exemption prescribed under the Exemption Order was available to them, however, as a matter of policy, the said exemption was no longer available to them from 12 February 2010. Paragraph 3 of the said decision of the respondent, found in exh. SYC1, signed by the Pengarah Jabatan Dasar Percukaian of LHDN, reads as follows:

> Merujuk kepada Perintah Cukai Pendapatan (Pengecualian) (No. 22) 2007[Exemption Order] PU(A) 327/2007, entity Labuan layak menikmati pengecualian ke atas pendapatan dividen … jika membuat pilihan dicukai di bawah [ITA]. Bagaimanapun berkuat kuasa 12.2.2010, pihak Kementerian Kewangan telah memutuskan bahawa entity Labuan yang membuat pilihan untuk dicukai di bawah [ITA] tidak layak menikmati pengecualian ke atas pendapatan dividen yang diterima … Penguatkuasaan **polisi** ini bertujuan memberi layanan cukai yang lebih adil terutama bagi syarikat-syarikat [lain] yang ditaksir di bawah [ITA]. Di samping itu, ianya juga dapat menyumbang ke atas peningkatan jumlah cukai bagi pembangunan Negara. (emphasis added)
>
> (Translation: Referring to the (Exemption Order), a Labuan entity qualifies to be exempted on its dividend income … if election has been made to be taxed under the ITA. On the other hand effective 12.2.2010, the Ministry of Finance has decided that a Labuan entity that elects to be taxed under the ITA no longer enjoys exemption for income derived from dividends. The enforcement of this **policy** is to ensure fairness to other companies assessed under the ITA. Apart from that it helps to contribute towards the improved collection of taxes for the development of the country (emphasis added))

[97] Naturally the appellants were upset with the respondent's stand of blowing hot and cold, and culminating with them being at the losing end. Chronologically on 18 December 2007 the Minister of Finance *vide* the Exemption Order exempted from income tax various types of income pursuant to s. 127(3)(b) of the ITA. At the time when the appellants were respectively incorporated on 16 March 2011 (Avenues Zone) and 22 March 2011 (GA Investment and Positive Vision), no one had any inkling that the forthcoming letter dated 20 June 2012 would reveal that the exemption had ended on 12 February 2010. In other words, the termination of the exemption was backdated to even prior to the incorporation and elections of the appellants. With no information available for the consumption of the public that the exemption had ended on 12 February 2010, and the appellants still believing that the Exemption Order was still subsisting, financial common sense must have persuaded them to make the irrevocable elections.

[98] From the point of view of the appellants, the income tax law as reflected in the amended s. 3B of the ITA was settled law, in that tax shall not be charged in respect of an offshore business carried on by an offshore company that has made an election to be taxed under the ITA, if exempted. Now, with the policy issued by the Minister of Finance and the benefits illusory even before the appellants were incorporated, the benefits of the Exemption Order were already beyond the reach of the appellants. Unfortunately, they could not opt out of the ITA scheme as the election was

irrevocable. By declaring 12 February 2010 as the cut-off date, the inevitable conclusion is that the said policy had led to a retrospective deprivation of a right that was statutorily available way back when exercising the rights of election.

[99] Evidentially there is nothing before us to show that prior to 2011 the Exemption Order was withdrawn, or any exemption was disallowed premised on some legal basis. As said, the first time the appellants knew of an exemption being denied to them was on 20 June 2012 through SYC1 as signed by the respondent.

[100] It was also through SYC1 that the appellants knew that once a Labuan entity has made an irrevocable election to bring itself under the ITA it loses its entitlement to the exemption on the profits. The effect of this policy naturally applies equally to the appellants.

[101] We now come to the next stage of discussing whether the Ministry of Finance could, merely by a policy or administrative decision, declare that an Exemption Order ceases to apply from a stipulated date without revoking the same.

[102] Section 3 of the Exemption Order, made on 18 December 2007, reads as follows:

> The Minister exempts from tax:
>
> (a) dividends received by an offshore company;
>
> (b) dividends received from an offshore company which are paid, credited or distributed out of income derived from an offshore business activity or, income exempt from tax; …

[103] Section 127(3) of the ITA provides that the Exemption Order is made by a statutory order, defined under s. 2 to mean an order having legislative effect. Clothed with legislative effect, this statutory order fits in squarely within the words 'subsidiary legislation', which is defined as, "any … order … or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967".

[104] The Exemption Order which comes as a statutory order thus has the legal status of a subsidiary legislation, and anything done under any subsidiary legislation shall be deemed to be done under the Act or other written law under which the subsidiary legislation was made (s. 24 Interpretation Acts 1948 and 1967).

[105] On the issue of construction of an Act it is useful to make reference to the Federal Court's decision in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 which states:

A The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in
B a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

> As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. (Per Gibbs J in *Beckwith v. R.* [1976] 12 ALR 333, at p. 337).

C **[106]** For purposes of this appeal, in succinct terms the Minister by statutory order, as empowered by s. 127(3) of the ITA, has granted an exemption to any offshore company in respect of its dividends income. As the appellants are offshore companies, the Exemption Order therefore applies to them.

D **[107]** Abiding by the rules of construction of statutes, namely by first giving the words their natural and ordinary meaning, looking fairly at the language used and what is being said, and appreciating the object of the statute to ascertain the will of Parliament, be it the principal or subsidiary legislation there is nothing difficult about the Exemption Order (*Mangin v. Inland Revenue Commissioners* [1971] AC 739). To ascertain the intention of
E Parliament, speeches made in Parliament as recorded in the Hansard will be of great help.

[108] In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, the Federal Court held that:

F Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* 28 CLR 129 at pp. 161-162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the
G intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

H The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v. Singhai Kepurchand* [1976] Jab LJ 340).

I

[109] We are not unaware that nothing has been built into s. 3B of the ITA to nullify the Exemption Order, or for that matter, have found any evidence that justifies the rewriting of the Minister's statutory order (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265). A

[110] Section 22 of the Interpretation Acts 1948 and 1967 provides that subsidiary legislation may at any time be … revoked … by the person or authority (in this case the Minister of Finance) by which it was made or by the replacement person of authority. In other words, the Minister of Finance could have, with ease, revoked the Exemption Order but this was not done. As an example, the Income Tax (Exemption) (No. 5) Order 1989 was revoked by the Income Tax (Exemption) (No. 5) (Revocation) Order 2010. In fact, when the Exemption Order was laid before the Dewan Rakyat pursuant to s. 127(4) of the ITA, the Income Tax (Exemption) Order 1991 (P.U (A) 161/199 and the Income Tax (Exemption) Order 2000 (P.U (A) 99/2000 were revoked effective from the year of assessment 2007. B C D

[111] Under s. 127(5) of the ITA, the words legislated in no uncertain terms state that 'any income which is exempt from tax by virtue of this section shall be disregarded for the purposes of this Act.' (In the present case it would apply to the appellants' income of "dividends received by an offshore company"). Under this provision, the word "disregard" means "to ignore or omit to regard or take notice" (*Aiyars Major Law Lexicon* 4th edn. 2010 vol. 2 at p. 2075). E

[112] It is pertinent to note that the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518; [2009] 4 MLJ 682 categorically stated that "In the context of s. 127(5), exemption means immunity, dispensation, exclusion, freedom, relief or exoneration from tax (see *The New Oxford Thesaurus of English 2000*)". F

[113] It follows that s. 127(5) of the ITA gives the appellants vested rights that cannot be taken away unless there exist clear terms that state otherwise (*National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99 at 107; *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Co-operative Insurance Society Ltd* [2000] 2 CLJ 149; [2000] 1 MLJ 561 at 566). G

[114] To wind up the issue before us, if the words of the Exemption Order are clear, then obey it (*Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421; [2014] 2 MLJ 1; *Kamla Devi v. Takhatmal* AIR 1964 SC 859). By virtue of the ordinary and natural meaning of the Exemption Order, and reading s. 3B of the ITA together with it, there can only be one interpretation ie, dividends are exempted from tax under the H I

ITA. As giving any other interpretation will lead to a departure of what is intended by the Legislature inscribed by the words of the statutory order, it is therefore incumbent upon the respondent to put into effect the appellants' statutory right ie, to exempt dividends from income tax.

[115] Much has been submitted by the respondent that due to the amendment of s. 3B of the ITA by Act 683, an offshore company which has made an election under the LBATA must now surrender itself totally to the ITA. On a plain reading of that provision, and in isolation with the other provisions of the ITA, the respondent cannot be censured for clinging on to that view. But, once the abovementioned amended s. 3B is read together with the Exemption Order of s. 3 and s. 127 of the ITA, the argument of the respondent must fall.

[116] In art. 96 of the Federal Constitution is engraved the profound words that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of Federal law. It is also trite that Parliament may delegate some of the powers to a Minister or any administrative body; and such delegation must be confined to the express authority delegated to it.

[117] With such terse words, it is therefore the duty of the court to carefully scrutinise the extent of the delegation (in this case the respondent), particularly in cases which involve a right to impose any financial burden on a person or class of persons. Even though the appellants here have not been burdened by additional taxes, we hold the view that by depriving them of the exemption, the appellants have been financially burdened in another way. McRuer CJ in *Bulova Watch Co v. Attorney General of Canada* [1951] OR 360 had occasion to state in the following manner:

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinised than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

[118] With the impugned policy never having been issued pursuant to any power authorised by Parliament, unlike an Exemption Order which is a subsidiary legislation, the policy adverted to by the respondent therefore does not have any force of law. It must be emphasised that by no figment of the imagination is an administrative policy anywhere near the level of a piece of legislation. In accordance with the settled rules of construction, the respondent or the Ministry of Finance thus have no jurisdiction to unilaterally and arbitrarily rely on policy to deny the appellants' entitlement

to the tax exemption (*Vacher & Sons v. London Society of Compositors* [1913] AC 107; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39).

[119] As the words in the Exemption Order are clear, and the appellants evidentially fall within the terms of the order, (and even admitted in SYC1 by the respondent) they therefore cannot be denied of the benefits legislated (*Edward Maughan (Surveyor of Taxes) v. The General Trustees of the Free Church of Scotland* (1893) 20R 759). In *Hansraj v. HH Dave Asst Collector of Excise* AIR 1970 SC 755, the Supreme Court observed:

> It is well established that in a taxing statute there is no room for intendment but regard must be had to the clear meaning of the word. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority.

[120] To wind up the loose ends, in the circumstances of the case, as the above all-enveloping explanation applies to all companies in like position, regardless of their nomenclature, the ineffectiveness of the policy invariably applies with equal force to any "chargeable offshore company". In short, the need to discuss the differences between an offshore company and chargeable offshore company in this appeal is unnecessary (see para 30).

The Cut-Off Date

[121] There is no time frame mentioned in the Exemption Order as to its duration. Despite the want of time frame or cut-off date, the letter of the respondent dated 20 June 2012 which contained the impugned decision, has put the cut-off date as 12 February 2010.

[122] As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia (supra)*, it is a well-settled principle that a provision in a statute conferring power on a member of the executive to enact subsidiary legislation, particularly one that imposes a financial levy or charges upon any section of the public, must be construed strictly. Despite the legal improbability of a subsidiary legislation rising above that of its parent Act, hierarchical requirement demands that an administrative policy may not rise above a subsidiary legislation; that hierarchical requirement therefore must be safeguarded (*Kerajaan Malaysia v. Wong Pot Heng & Anor* [1997] 2 CLJ 188 at 203). Peh Swee Chin FCJ at p. 198 in the latter case had occasion to state:

> Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg, from the Administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguard for such subsidiary legislation and Courts are part of such safeguards.

[123] Perusing the Exemption Order, and as explained above, it is crystal clear that the respondent, or the Ministry of Finance, has no jurisdiction to unilaterally and arbitrarily declare 12 February 2010 as the cut-off date for the appellants to claim tax exemption for its dividend income by way of policy (*Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] 4 CLJ 576).

Conclusion

[124] With the Exemption Order yet to be revoked, apart from not prescribing a time frame for its duration, the respondent or the Ministry of Finance cannot by policy or administrative decision declare that the Exemption Order ceases to apply as against the appellants.

[125] That denial of right to the exemption is therefore *ultra vires*, illegal, void, unlawful and/or in excess of any authority given.

[126] My learned sister Zaharah Ibrahim (FCJ) has read this judgment in draft and has expressed her agreement with it.

[127] For the above reasons, we allow the appellants' appeals with costs. Costs to be subject to allocator.

[128] Question (a) is to be answered in the negative whilst questions (b) and (c) are to be answered in the positive.